

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 05, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP3348-CR

Cir. Ct. No. 1994CF943302

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NORMAN STAPLETON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Norman D. Stapleton appeals *pro se* from a circuit court order denying a postconviction motion in which he ostensibly sought sentence modification. Stapleton argued that the circuit court had applied the wrong standards when it imposed sentence. In denying the motion, the circuit

court reasoned that Stapleton's claim was not cognizable in a motion for sentence modification and so treated the motion as one for postconviction relief under WIS. STAT. § 974.06. We agree with the circuit court's reasoning and its ultimate conclusion that Stapleton's motion was barred by *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 184-85, 517 N.W.2d 157 (1994) (defendant barred from raising in postconviction motion claims that could have been raised in prior postconviction and appellate proceedings, unless defendant articulates a sufficient reason for that failure). We therefore affirm the circuit court's order.

¶2 A jury convicted Stapleton of the 1994 robbery and burglary of a sixty-five-year-old woman. Stapleton appealed, arguing that lineup identifications of him had been impermissibly suggestive and therefore should have been suppressed. This court rejected Stapleton's arguments and affirmed the conviction. Stapleton then filed a postconviction motion in which he alleged that his trial counsel had been ineffective and that his postconviction/appellate counsel had been ineffective for failing to challenge trial counsel's effectiveness. In his motion, which was denied by the circuit court in an order affirmed on subsequent appeal, Stapleton claimed that his trial counsel was ineffective for: (1) failing to challenge the legality of his arrest; (2) failing to object to the State's cross-examination of him regarding statements he made to police; (3) allowing a potential juror with a prior criminal conviction to be dismissed from the jury; and (4) failing to impeach a witness.

¶3 After this court issued its opinion on Stapleton's second appeal, Stapleton filed the postconviction motion that is the subject of this appeal. He argued that he should be resentenced based on information that was not presented by counsel at the original sentencing. He also argued that the circuit court erroneously exercised sentencing discretion by imposing excessive, unduly harsh

sentences and by failing to explain its sentences adequately. The circuit court denied the motion, reasoning first that, regardless of the caption on Stapleton's filing, Stapleton's motion was not actually a sentence modification motion, but was instead a postconviction motion filed under WIS. STAT. § 974.06. It then held that the motion was barred by *Escalona-Naranjo*.

¶4 On appeal, Stapleton first argues that the circuit court misconstrued his sentence-modification motion, ostensibly filed under WIS. STAT. § 973.19, as one filed under WIS. STAT. § 974.06. We disagree. Stapleton was convicted and sentenced in 1995. His sentences were subsequently vacated, and Stapleton was resentenced in 1997. Motions to modify sentence under § 973.19 are to be filed within 90 days of sentencing by a defendant who has not ordered transcripts. *See* § 973.19(1)(a). By filing a § 973.19 motion, a defendant “waives his or right to file an appeal or postconviction motion under s. 809.30(2).” § 973.19(5). Clearly, Stapleton's motion did not meet the criteria of § 973.19. In addition, by the time he filed his § 973.19 motion, Stapleton had already pursued relief under WIS. STAT. RULE 809.30 and § 974.06.

¶5 By construing Stapleton's motion to be one filed under WIS. STAT. § 974.06, the circuit court appears to have been attempting to re-frame the motion as one consistent with Stapleton's allegations. Stapleton's allegations were unsuitable for a “new factor” sentence-modification motion because a new factor is “a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). Although Stapleton claimed he was using a “new factor” analysis in his motion, none of his claims fit the *Rosado* definition.

Instead, Stapleton argued that the circuit court failed to properly weigh sentencing factors, such as the seriousness of the offenses, and imposed an insupportably harsh sentence. While it is questionable whether these arguments are cognizable under WIS. STAT. § 974.06, which is a statute reserved for “claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack,” it is nonetheless the statute most suitable for Stapleton’s claims.

¶6 Although a motion for sentence modification based upon a “new factor” can be made at any time,¹ claims of a circuit court’s erroneous exercise of discretion may not. Under *Escalona-Naranjo*, 185 Wis. 2d at 185, issues not raised in prior postconviction or appellate proceedings may not be raised in subsequent proceedings unless the defendant states a sufficient reason for his or her failure to raise them in the earlier proceedings. In his postconviction motion, Stapleton did not state any reason, much less a sufficient reason, for his failure to raise his claims that the sentence was excessive and that the circuit court

¹ See *State v. Noll*, 2002 WI App 273, ¶12, 258 Wis. 2d 573, 653 N.W.2d 895 (circuit court’s inherent authority to modify sentence based on new factors is not governed by a time limitation).

erroneously exercised sentencing discretion. The circuit correctly held that Stapleton's claims were therefore barred.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

